

ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT

IN THE MATTER OF:)	
)	
Poarch Band of Creek Indians)	PROPOSED
Atmore, Escambia County, Alabama)	CONSENT ORDER NO: 21-XXX-CAP
)	
)	

PREAMBLE

This Special Order by Consent is made and entered into by the Alabama Department of Environmental Management (hereinafter, “the Department” and/or “ADEM”) and Poarch Band of Creek Indians (hereinafter, “PCI”), pursuant to the provisions of the Alabama Environmental Management Act, Ala. Code, §§22-22A-1 through 22-22A-17, *as amended*, the Alabama Air Pollution Control Act, Ala. Code §§22-28-1 to 22-28-23, *as amended*, and the regulations promulgated pursuant thereto.

1. PCI owns real property located at latitude/ longitude (31.1018, -87.5051) on Curtis Road in Atmore, Escambia County, Alabama (hereinafter, “Martin Pit”).
2. The Department is a duly constituted department of the State of Alabama pursuant to Ala. Code §§ 22-22A-1 to 22-22A-17, *as amended*.
3. Pursuant to Ala. Code § 22-22A-4(n), *as amended*, the Department is the state air pollution control agency for the purposes of the federal Clean Air Act, 42 U.S.C. 7401 to 7671q, *as amended*. In addition, the Department is authorized to administer and enforce the provisions of the Alabama Air Pollution Control Act, Ala. Code §§ 22-28-1 to 22-28-23, *as amended*.

4. The U.S. Environmental Protection Agency's National Emission Standard for Hazardous Air Pollutants (NESHAP), found at 40 C.F.R. Part 61, Subpart M, is incorporated by reference in ADEM Admin. Code r. 335-3-11-.02(12).

5. 40 C.F.R. §61.141 defines Regulated asbestos-containing material (RACM) as (a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

6. 40 C.F.R. § 61.145(a)(1) states that in a facility being demolished, all the requirements of paragraphs (b) and (c) of this section apply, except as provided in paragraph (a)(3) of this section, if the combined amount of RACM is at least 260 linear feet on pipes, at least 160 square feet on other facility components, or at least 35 cubic feet off facility components where the length or area could not be measured previously.

7. 40 C.F.R. § 61.145(b)(3)(i) requires the owner or operator of a demolition or renovation activity for a subject facility to provide written Notice of Intention to Demolish or Renovate (hereinafter, "Notice") at least ten workdays before demolition, asbestos stripping or removal work, or any other activity which disturbs the asbestos.

8. 40 C.F.R. § 61.145(c)(1) requires the removal of all RACM from a facility being demolished or renovated before any activity begins that would break up, dislodge, or similarly disturb the material or preclude access to the material for subsequent removal.

9. ADEM Admin. Code r. 335-3-11-.05(1) states that any person, firm, organization, or corporation who is the owner or operator of any asbestos removal project

for which notification is required pursuant to the requirements of rule 335-3-11-.02(12) shall ensure that the parties executing the asbestos removal project are certified by the Department.

10. ADEM Admin. Code r. 335-3-3-.01(2)(b)1 states that "...open burning must take place on the property on which the combustible fuel originates."

11. ADEM Admin. Code r. 335-3-3-.01(2)(b)4 states that "Only vegetation and untreated wood may be burned. It is unauthorized to open burn heavy oils, asphalt products, plastics, vinyl materials, insulation, paper, cardboard, natural or synthetic rubber, salvage or scrap materials, chemicals, garbage, treated or painted wood, or any trash."

DEPARTMENT'S CONTENTIONS

12. On October 6, 2020 and October 8, 2020, the Department received complaints of unauthorized open burning of a demolished residential structure that included asbestos containing materials (ACM) being conducted at Martin Pit.

13. In the October 9, 2020 letter submitted to the Department, PCI reported that a residential structure containing ACM was demolished on September 17, 2020, by PCI public works employee(s). On September 18, 2020, the demolition debris was hauled in uncovered dump trucks to Martin Pit and added to a pile of wood and imported vegetative storm debris. Portions of the ACM were subsequently burned along with imported vegetative debris. As reported by PCI, active burning at Martin Pit stopped on September 18, 2020, though debris continued to smolder; Martin Pit was secured with a locked gate and operations and burning ceased on October 2, 2020.

14. On October 13, 2020, the Department conducted an investigation of the Martin Pit and Moore House sites. The gate to Martin Pit was locked and contained signs noting the presence of asbestos. No burning was noted at the time of the inspection.

15. Pursuant to Ala. Code § 22-22A-5(18)c., *as amended*, in determining the amount of any penalty, the Department must give consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty. Any civil penalty assessed pursuant to this authority shall not exceed \$25,000.00 for each violation, provided however, that the total penalty assessed in an order issued by the Department shall not exceed \$250,000.00. Each day such violation continues shall constitute a separate violation. In arriving at this civil penalty, the Department has considered the following:

A. SERIOUSNESS OF THE VIOLATION: PCI conducted prohibited open burning of regulated ACM and imported vegetative debris at the Martin Pit site and the Department considers these violations to be serious.

B. THE STANDARD OF CARE: There appeared to be some care taken by PCI to comply with the applicable requirements of the ADEM Admin. Code by having an asbestos inspection performed and ceasing burning.

C. ECONOMIC BENEFIT WHICH DELAYED COMPLIANCE MAY HAVE CONFERRED: PCI likely derived economic benefit by not properly removing and handling ACM and illegally open burning prohibited materials instead of properly disposing of them after demolishing the structure.

D. EFFORTS TO MINIMIZE OR MITIGATE THE EFFECTS OF THE VIOLATION UPON THE ENVIRONMENT: At the time of the violations, there were

some efforts by PCI to mitigate the possible effects upon the environment by ceasing burning and separating the remaining ACM.

E. HISTORY OF PREVIOUS VIOLATIONS: PCI does not have a prior history of violations with the Department for asbestos and/ or demolition nor illegal open burning.

F. THE ABILITY TO PAY: PCI has not alleged an inability to pay the civil penalty.

G. OTHER FACTORS: The Owner by burning a demolished residential structure that included asbestos containing materials risked exposing its employees, contractors, and other individuals to asbestos.

16. The Department has carefully considered the six statutory penalty factors enumerated in Ala. Code § 22-22A-5(18)c., *as amended*, as well as the need for timely and effective enforcement, and has concluded that a civil penalty herein is appropriate (*See* “Attachment A” which is hereby made a part of these Contentions).

17. The Department neither admits nor denies PCI’s contentions, which are set forth below. The Department has agreed to the terms of this Consent Order in an effort to resolve the alleged violations cited herein without unwarranted expenditure of State resources in prosecuting the above violations. The Department has determined that the terms contemplated in this Consent Order are in the best interests of the citizens of Alabama.

PCI’S CONTENTIONS

18. PCI neither admits nor denies the Department’s contentions.

19. PCI was not aware of the Complaints made to ADEM on October 6 and 8, 2020, prior to reporting the incidents at the Moore House and Martin Pit to ADEM on October 9, 2020.

20. The demolition of the Moore House was necessitated when the house was inadvertently damaged by a PCI Public Works crew that was attempting to remove a large oak tree adjacent to the house that had been damaged during Hurricane Sally. The damage to the house caused the house to lean, which posed a substantial potential danger and risk of injury. Demolition of the Moore House would not have occurred at that time if it had not been damaged and posed a risk to persons who might enter the Moore House property, including employees of PCI and members of the public.

21. Shortly after it was discovered that the Moore House had been demolished and ACM demolition debris had been taken to Martin Pit, PCI worked quickly to notify ADEM of the events and notify PCI employees of any potential exposure. PCI also erected fencing and warning signs at both the Moore House and Martin Pit to decrease any risk of exposure at the sites and to minimize the potential that persons would enter these sites.

ORDER

THEREFORE, PCI, along with the Department, desires to resolve and settle the compliance issues cited above. The Department has carefully considered the facts available to it and has considered the six penalty factors enumerated in Ala. Code § 22-22A-5(18)c., *as amended*, as well as the need for timely and effective enforcement and has determined that the following conditions are appropriate to address the violations alleged herein. Therefore, the Department and PCI agree to enter into this Consent Order with the following terms and conditions:

A. PCI agrees to the remediation of the Martin Pit and Moore House sites within 90 days of the date of this Consent Order in accordance with the Plan submitted by Environmental Services Group, LLC dated October 17, 2020. The Plan is incorporated herein by reference and made a part of the Consent Order.

B. PCI agrees to pay the Department a civil penalty in the amount of \$7,500.00 in settlement of the violations alleged herein within forty-five days from the date of issuance of this Consent Order. Failure to pay the civil penalty within the specified timeframe after the issuance of this Consent Order may result in the Department filing a civil action in the Circuit Court of Montgomery County to recover the unpaid civil penalty.

C. PCI agrees that all penalties due pursuant to this Consent Order shall be made payable to the Alabama Department of Environmental Management by certified or cashier's check and shall be remitted to:

Office of General Counsel
Alabama Department of
Environmental Management
P.O. Box 301463
Montgomery, Alabama 36130-1463

D. PCI agrees that it, immediately upon the effective date of this Consent Order and continuing thereafter, shall ensure immediate and future compliance with ADEM Admin. Code r. 335-3-3-.01 and r. 335-3-11-.05.

E. The parties agree that this Consent Order shall apply to and be binding upon both parties, their directors, officers, and all persons or entities acting under or for them. Each signatory to this Consent Order certifies that he or she is fully authorized by the party he or she represents to enter into the terms and conditions of this Consent Order, to execute the Consent Order on behalf of the party represented, and to legally bind such party.

F. The parties agree that, subject to the terms of these presents and subject to provisions otherwise provided by statute, this Consent Order is intended to operate as a full resolution of the alleged violations and/or deviations which are cited in this Consent Order.

G. PCI agrees that it is not relieved from any liability if it fails to comply with any provision of this Consent Order.

H. For purposes of this Consent Order only, PCI agrees that the Department may properly bring an action to compel compliance with the terms and conditions contained herein in the Circuit Court of Montgomery County. PCI also agrees that in any action brought by the Department to compel compliance with the terms of this Agreement, PCI shall be limited to the defenses of *Force Majeure*, compliance with this Agreement and physical impossibility. A *Force Majeure* is defined as any event arising from causes that are not foreseeable and are beyond the reasonable control of PCI, including its contractors and consultants, which could not be overcome by due diligence (i.e., causes which could have been overcome or avoided by the exercise of due diligence will not be considered to have been beyond the reasonable control of PCI) and which delays or prevents performance by a date required by the Consent Order. Events such as unanticipated or increase costs of performance, changed economic circumstances, normal precipitation events, or failure to obtain federal, state, or local permits shall not constitute *Force Majeure*. Any request for a modification of a deadline must be accompanied by the reasons (including documentation) for each extension and the proposed extension time. This information shall be submitted to the Department a minimum of ten working days prior to the original anticipated completion date. If the Department, after review of the extension request, finds the work was delayed because of conditions beyond the control and without the fault of PCI, the Department may extend the time as justified by the

circumstances. The Department may also grant any other additional time extension as justified by the circumstances, but it is not obligated to do so.

I. The Department and PCI agree that the sole purpose of this Consent Order is to resolve and dispose of all allegations and contentions stated herein concerning the factual circumstances reference herein. Should additional facts and circumstances be discovered in the future concerning illegal open burning which would constitute possible violations not addressed in this Consent Order, then such future violations may be addressed in Orders as may be issued by the Director, litigation initiated by the Department, or such other enforcement action as may be appropriate, and PCI shall not object to such future orders, litigation, or enforcement action based on the issuance of this Consent Order if future orders, litigation, or other enforcement action addresses new matters not raised in this Consent Order.

J. The Department and PCI agree that this Consent Order shall be considered final and effective immediately upon the signature of all parties. This Consent Order shall not be appealable, and PCI does hereby waive any hearing on the terms and conditions of the same.

K. The Department and PCI agree that this Order shall not affect its obligation to comply with any Federal, State, or local laws or regulations.

L. The Department and PCI agree that final approval and entry into this Order are subject to the requirements that the Department give notice of proposed Orders to the public, and that the public have at least thirty days within which to comment on the Order.

M. The Department and PCI agree that, should any provision of this Order be declared by a court of competent jurisdiction or the Environmental Management

Commission to be inconsistent with Federal or State law and therefore unenforceable, the remaining provisions hereof shall remain in full force and effect.

N. The Department and PCI agree that any modifications of this Order must be agreed to in writing signed by both parties.

O. The Department and PCI agree that, except as otherwise set forth herein, this Order is not and shall not be interpreted to be a permit or modification of an existing permit under Federal, State, or local law, and shall not be construed to waive or relieve PCI of its obligations to comply in the future with any permit.

Executed in duplicate, with each part being an original.

POARCH BAND OF CREEK INDIANS

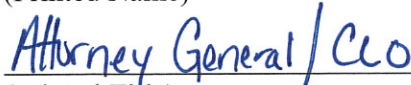
ALABAMA DEPARTMENT OF
ENVIRONMENTAL MANAGEMENT



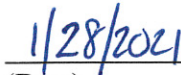
(Signature of Authorized Representative)



(Printed Name)



(Printed Title)



(Date)

Lance R. LeFleur
Director

(Date Executed)

ATTACHMENT A

Poarch Band of Creek Indians Atmore, Escambia County, AL

Violation*	Number of Violations*	Seriousness of Violation*	Standard of Care*	History of Previous Violations*	
Illegal open burning	1	\$3,000	\$500	\$0	
Failure to comply with the Department's requirements for asbestos abatement and/ or demolition	1	\$3,000	\$500	\$0	
					Total of Three Factors
TOTAL PER FACTOR		\$6,000	\$1,000	\$0	\$7,000

Adjustments to Amount of Initial Penalty	
Mitigating Factors (-)	
Ability to Pay (-)	
Other Factors (+/-)	
Total Adjustments (+/-) <i>Enter at Right</i>	\$0

Economic Benefit (+)	\$500
Amount of Initial Penalty	\$7,500
Total Adjustments (+/-)	\$0
FINAL PENALTY	\$7,500.00

Footnotes

* See the "Department's Contentions" portion of the Order for a detailed description of each violation and the penalty factors.